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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of RACHEL and JAMES B. KISIEL.	
RACHEL HOLTON, Respondent, v. JAMES B. KISIEL, Appellant; NAPA COUNTY DEPARTMENT OF CHILD SUPPORT SERVICES, Intervener and Respondent.	A117211 (Napa County Super. Ct. No. 2600350)

This appeal has been taken from a trial court order that modified appellant James B. Kisiel's child support obligations. He contends that the court erred in determining the parties' respective earning capacities when it calculated the amount of support. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is the third time appellant has taken an appeal in this marital dissolution proceeding.[1]

[1] Both appeals resulted in nonpublished opinions. (*In re Marriage of Kisiel* (Dec. 23, 2004, A103392); *In re Marriage of Kisiel* (Feb. 6, 2006, A115120).)

In April 2003, appellant was ordered to pay $1,241 per month in child support for the parties' four children. In calculating this amount, the trial court imputed an income of $2,600 to appellant, and declined to impute any income to respondent Rachel Holton. We upheld this order in the first appeal. In the second appeal, we upheld the court's order granting respondent's motion to be allowed to move to the State of Georgia with three of the parties' children.

On August 22, 2006, appellant filed a motion for modification of the 2003 child support order.[2] In his moving papers, he requested that respondent be ordered to pay half of the college fees for their eldest son (who had just turned 18) until graduation. He also requested that Georgia's cost of living be applied to his support payment calculation.

On October 11, 2006, respondent filed her responsive declaration. In her response she asked the trial court to deny the request regarding payment of the eldest son's college fees. She requested that appellant's support payment be adjusted to remove the son from the calculation as he was no longer a minor. She also requested that appellant's timeshare factor be lowered to 23 percent, and that he be ordered to pay one-half of the air fare costs incurred when the minor children travel to visit him in California. She stated that she was not employed and was unable to work both due to "numerous physical ailments" and because she had to spend much of her time attending to one of the parties' children, who has a disability.

Appellant's motion was heard on November 8, 2006. The Napa County Department of Child Support Services (Department) appeared per Family Code[3] section 17400 et seq.[4]

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[2] We have granted the Attorney General's request to augment the record to include several documents relevant to this appeal, including appellant's motion to modify child support.

[3] All further statutory references are to the Family Code except as otherwise indicated.

[4] Section 17400, subdivision (k), provides, in part: "In the exercise of the authority granted under this article, the local child support agency may intervene . . . by

At the hearing, appellant requested a timeshare of 46 percent. He testified that he was unable to earn the income previously imputed to him because his driver's and contractor's licenses had been suspended for the past year and a half. He also challenged respondent's claim that she was unable to work, attempting to introduce evidence that she had been working in her mother-in-law's restaurant, baking cakes and seating customers. Based on his assumption that the cost of living is lower in Georgia than in California, he also requested that child support be reduced by 30 percent. Under questioning by the Department, he testified regarding his monthly income. The matter was taken under submission after the parties filed additional briefing.

On March 2, 2007, the trial court issued its decision. The court reduced appellant's monthly child support obligation from $1,241 to $927. The court found there had not been any change of circumstance with respect to his ability to earn income and retained the $2,600 per month figure that had been previously imputed to him. The court imputed $300 per month to respondent as self-employment income, based on her baking activities. The court adjusted appellant's timeshare to 33 percent and removed the eldest son from the support calculation.

In its ruling, the trial court declined appellant's request to deviate from guideline support based on the cost of living in Georgia. The court also declined to reduce support to account for costs incurred when he travels to visit with the children in Georgia. The court found his expenses were offset by the costs incurred by respondent, who is obligated to pay air fare for the minor children three times a year when they visit with appellant. Finally, the trial court found that the amount of child support arrearages owed by appellant as of December 1, 2006, was $95,071.13. This appeal followed.

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ex parte application, in any action under this code, or other proceeding in which child support is an issue or a reduction in spousal support is sought. By notice of motion, order to show cause, or responsive pleading served upon all parties to the action, the local child support agency may request any relief that is appropriate that the local child support agency is authorized to seek." The Attorney General is representing the Department on appeal.

II. DISCUSSION

A. *Principles of Appellate Review*

We begin by setting forth the basic principles of appellate review. First, "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Because error is never presumed, it is every appellant's duty to demonstrate error in the record the appellant produces before the reviewing court. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409.)

Second, "error alone does not warrant reversal. 'It is a fundamental principle of appellate jurisprudence in this state that a judgment will not be reversed unless it can be shown that a trial court error in the case affected the result.' [Citation.] ' "The burden is on the appellant, not alone to show error, but to show injury from the error." ' [Citation.] 'Injury is not presumed from error, but injury must appear affirmatively upon the court's examination of the entire record.' [Citation.] 'Only when an error has resulted in a miscarriage of justice will it be deemed to be prejudicial so as to require reversal.' [Citation.] A miscarriage of justice is not found 'unless it appears reasonably probable that, absent the error, the appellant would have obtained a more favorable result.' [Citation.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822–823 (*Falcone*).)

Third, "[i]t is incumbent upon the parties to an appeal to cite the particular portion of the record supporting each assertion made. It should be apparent that a reviewing court has no duty to search through the record to find evidence in support of a party's position." (*Williams v. Williams* (1971) 14 Cal.App.3d 560, 565.) To that end, California Rules of Court, rule 8.204(a)(1)(C) provides that a brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears."

Fourth, every argument presented by an appellant must be supported by both coherent argument and pertinent legal authority. (*Berger v. California Ins. Guarantee*

Assn. (2005) 128 Cal.App.4th 989, 1007 (*Berger*).) If either is not provided, the appellate court may treat the issue as waived. (*Ibid*.)

B. *Burden of Proof and Standard of Review*

With certain exceptions not applicable here, "the trial court may modify or terminate a child support order at any time the court deems it necessary. [Citations.] The statutory procedures for modification of a child support order 'require a party to introduce *admissible evidence of changed circumstances* as a necessary predicate for modification.' [Citations.] 'The burden of proof to establish that changed circumstances warrant a downward adjustment in child support *rests with the supporting spouse*.' [Citation.]" (*In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1234, fn. omitted, italics added.)

"Ordinarily, a *factual* change of circumstances is required [for an order modifying support] (e.g., increase or decrease in either party's income available to pay child support)." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 17:26, p. 17-11.) "There are no rigid guidelines for judging whether circumstances have sufficiently changed to warrant a child support modification. So long as the statewide statutory formula support requirements are met [citation], the determination is made on a case-by-case basis and may properly rest on fluctuations in *need* or *ability to pay*." (*Id.* at ¶ 17:40, p. 17-14; see also *In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009, 1015.)

It is well established that the amount of child support rests in the sound discretion of the trial court and an appellate court cannot interfere with the trial court order unless, as a matter of law, an abuse of discretion is shown. (*Primm v. Primm* (1956) 46 Cal.2d 690, 694; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947.) The power of the appellate court therefore begins and ends with the determination as to whether the trial court had any substantial evidence (whether or not contradicted) to support its conclusions. (*Primm*, at p. 693.) The appellate court should not substitute its own judgment for that of the trial court; it should determine only if any judge reasonably could have made such an order. (*In re Marriage of Siegel* (1972) 26 Cal.App.3d 88, 90.)

C. *Calculation of Respondent's Earning Capacity*

Appellant claims the $300 per month that the trial court imputed to respondent is too low. Citing to cases involving the federal minimum wage, he claims that the court was required to impute to her the equivalent of full-time employment at the minimum wage.

Section 4058, which defines annual gross income for purposes of child support calculations, expressly provides: "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (§ 4058, subd. (b).) "A trial court's decision to impute income to a parent for child support purposes based on the parent's earning capacity is reviewed under the abuse of discretion standard." (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1393.)

We first observe that appellant did not raise the applicability of federal minimum wage in the trial court. During the hearing on his motion, he attempted to introduce statements made by the children regarding respondent's baking activities. The court sustained her hearsay objection to this evidence, and then said: "But let me just indicate I do intend to impute income to [respondent]." Thereafter, appellant did not make any proposal as to the amount of income the court should attribute to respondent. " ' "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . ." ' " (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) " ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ." ' [Citation.]" (*Id*. at p. 590, fn. omitted.) By not raising the federal wage issue in the trial court, appellant has waived this argument.[5]

[5] We recognize appellant is representing himself. "Under the law, a party may choose to act as his or her own attorney. [Citations.] '[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' [Citation.] Thus, as is the case with attorneys, pro.

In any event, the cases relied upon by appellant are inapposite, as they concern the application of wage laws as between employers and employees, not the imputation of income to parents under the Family Code. For example, the United States Supreme Court in *Gemsco, Inc. v. Walling* (1945) 324 U.S. 244, 254-255, found that the Administrator of the Wage and Hour Division of the Department of Labor was empowered under the Fair Labor Standards Act of 1938 to prohibit companies from allowing or requiring their employees to do manufacturing work in their homes. Similarly, *Sullivan v. Del Conte Masonry Co.* (1965) 238 Cal.App.2d 630 and *Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d 1510 both concern the application of state wage and hour laws.

Appellant's related claim that respondent failed to prove "that her support obligation should not conform to State Standards" is unavailing. In the first place, as we have already noted, it was *appellant's* burden to prove that a modification of the existing support order was justified by a change of circumstances. Secondly, courts are empowered to make individualized determinations as to the earning capacity of each parent. There is no requirement or policy requiring parents to make equivalent monetary contributions towards child support. Rather, earning capacity is determined on a case-by-case basis, according to each parent's "age, health, education, marketable skills, employment history, and the availability of employment opportunities." (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234.)

Appellant further claims the trial court erred in deeming respondent's health to be a limiting factor on her earning capacity, as she did not offer specific evidence regarding her present health condition. He appears to be arguing that the court was not authorized to consider the findings it made in the 2003 order. While he claims the court could not "presume that the Respondent's health is the same as before," his contention is unsupported by any citation to legal authority. There is no rule we are aware of that

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per. litigants must follow correct rules of procedure." (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.)

prohibits the court from considering the substance of an order the complaining party is seeking to modify.

In our first opinion in this dissolution proceeding, we noted the trial court had determined in 2003 that "[d]ue to carpal tunnel syndrome [respondent] [had] limited job opportunities—although she is not prevented by her disability from undertaking all employment activities." (*In re Marriage of Kisiel, supra*, A103392.) We also concluded that the trial court at that time had "made a reasonable assessment that [respondent's] parenting duties constitute essentially a 'full-time job,' and child care payments would consume much of her employment income."[6] Thus, we sustained the court's finding that respondent did not presently have any earning capacity.

While appellant claims the court erred in accepting respondent's position that her health had not significantly improved, as the moving party the burden of proof was on *him* to provide admissible evidence that she had both the ability and the opportunity to earn the attributed income he sought to impute to her. (See *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1329.) Instead, respondent submitted a declaration stating that she continued to suffer from multiple physical ailments, and that she was required to provide care for to the parties' disabled child. Appellant did not raise any evidentiary objections to her declaration. We note that in spite of his failure to produce any admissible contradictory evidence, the court did agree to impute some income to respondent. We conclude appellant has failed to demonstrate that the court abused its discretion. (*In re Marriage of Graham* (2003) 109 Cal.App.4th 1321, 1326; *In re Marriage of Destein*, *supra*, 91 Cal.App.4th at p. 1393.)

D. *Calculation of Appellant's Earning Capacity*

Appellant claims that the calculation of his imputed income should have been reduced because the trial court had already refused to reinstate his contractor's license

[6] We take judicial notice of our prior opinion pursuant to Evidence Code sections 452, subdivision (d), and 459.

and his driver's license.[7] He argues that under the equal protection clause of the United States Constitution, the court was required to give him the same relief as it gave to respondent when it imputed reduced wages to her. We are not persuaded.

Substantial evidence supports the trial court's finding that there was no change in circumstances to justify modifying the amount of income the court imputed to him in 2003. In the 2003 order, the court found that appellant was capable of earning $15 per hour, or $2,600 per month. This figure was arrived at based on his testimony that he earned $15 per hour as a construction worker when he was able to find work. At the time, he testified that he had actually earned only $40 in January 2003, and $160 in February 2003. In contrast, the income and expense declaration submitted by appellant in conjunction with the present motion indicates that he was earning an average of $1,015 per month.[8] The court was thus justified in observing that "this is a major increase in income compared to the 2003 hearing." The court's order also includes the observation that appellant "has the intellect, talent and skills to be earning at least as much as he was found capable of earning almost four years ago." We also note the 2003 order reveals his contractor's and driver's licenses had been periodically suspended during that time, which also supports the conclusion that his circumstances had not changed significantly since 2003. Accordingly, we find the court did not abuse its discretion in declining to modify the order imputing $2,600 in monthly income to appellant.

Appellant also claims that his income should have been calculated as self-employment income, and not as wages. As noted at the outset of our opinion, erroneous rulings will not be reversed on appeal absent a showing of prejudice, that is, that the appealing party would have received a better result had the error not occurred. (*Falcone, supra,* 164 Cal.App.4th at pp. 822–823.) As appellant does not state how the child

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[7] It appears his licenses had been suspended due to his failure to pay child support. Licensing agencies may suspend licenses for a failure to comply with child support orders. (§ 17520.)

[8] Appellant was still doing construction work as a handyman at the time of the November 2006 hearing.

support calculation would have been altered had the court properly categorized his imputed income, we find the error, if any, does not warrant reversal.

E. ***Alleged Gender Discrimination***

Finally, appellant claims that the court demonstrated gender bias in ruling that he is required support the children fully, while respondent is "free of this obligation." Again citing to the equal protection clause, he claims the court must "correct this inequity." However, he does not point to any specific evidence of gender bias. For example, he does not cite to any comments made by the court that would suggest that it was either prejudiced against appellant because of his gender, or predisposed to favor respondent because of her gender. As noted above, this court is not required to consider arguments that are unsupported by citation to the record. (*Berger*, *supra*, 128 Cal.App.4th at p. 1007.) In any event, we have reviewed the record in this case and find no evidence of any bias whatsoever on the part of the trial court.

III. DISPOSITION

The order is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

_____
Flinn, J.*

* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.